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No. 02-1609

Supreme Court, U.S.
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In The

Supreme Court of the United States

THE CITY OF LITTLETON, COLORADO,

Petitioner,

v.

Z.J. GIFTS D-4, L.L.C.,
a Colorado Limited Liability Company d/b/a CHRISTAL'S,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented by Petitioner are as follows:

1. For the purposes of reviewing content-neutral sexually oriented business licensing decisions, is prompt judicial access sufficient or must a city somehow provide a prompt judicial decision?

2. If prompt access to a court of law is insufficient, then what must a city do to provide sufficient safeguards under the First Amendment?

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Z.J. Gifts D-4, L.L.C., states it is a Colorado Limited Liability Company. None of its shares are held by a publicly traded company and there are no parent companies.

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STATEMENT OF THE CASE

The City has filed a Petition for Writ of Certiorari on the issue of whether the procedures for appealing an adverse licensing decision in the Littleton adult entertainment business licensing ordinance satisfy the constitutional requirement of "prompt judicial review" established in *Freedman v. Maryland*, 380 U.S. 51 (1965), and applied to sexually oriented businesses in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

Respondent brought the instant action pursuant to 42 U.S.C. section 1983 challenging on numerous grounds the constitutionality of the Littleton adult entertainment business licensing ordinance, Littleton Municipal Code section 3-14-1, *et seq*. The district court upheld the Littleton ordinance in all respects. (App. 40-67). The Tenth Circuit opinion affirmed in part and reversed in part the district court's order. (App. 1-39).

The Tenth Circuit determined that Littleton waived the issue of abstention under *Younger v. Harris*, 401 U.S. 37 (1971), even though the City had filed a civil complaint in state court against Respondent for violations of the challenged ordinance. (App. 9-10). The Tenth Circuit found that Respondent did not have standing to challenge the civil disability provisions or the suspension and revocation provisions of the Littleton ordinance. (App. 11). See *Essence Inc. v. City of Federal Heights*, 285 F.3d 1272, 1280 (10th Cir. 2002). The panel went on to determine that Respondent did not have standing to challenge the terms "substantial or significant" on vagueness grounds. (App. 12-14). The Tenth Circuit determined that these terms were readily susceptible to a narrowing construction and suggested that a common method has been to develop a

percentage that will act as a guide as to what constitutes substantial and significant. Respondent's challenge to a 21 year old age restriction was found to be moot. (App. 14-15).

The Tenth Circuit then discussed in detail the decision in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 107 L.Ed. 2d 603, 110 S.Ct. 596 (1990), and found the requirements of obtaining fingerprinting and a zoning certificate prior to obtaining an adult entertainment license were "unconstitutional for failure to specify a time limit within which the City must act." (App. 20-24). The Court upheld a requirement that a sales tax license be obtained from the City prior to obtaining an adult entertainment establishment license. (App. 21). Respondent filed a petition for panel rehearing on this issue, which petition was denied. (App. 68-69).

The Tenth Circuit then addressed the issue of prompt judicial review, and after reviewing the case law from the Supreme Court and other circuits on this issue, determined that the "prompt judicial review" required a prompt judicial determination. Because the procedure provided in the Littleton ordinance, Colorado Rules of Civil Procedure 106(a)(4), "does not assure that license decisions will be given expedited review," the Littleton ordinance was determined to be unconstitutional. (App. 28-32). Finally, the panel upheld Littleton's location restrictions on adult entertainment establishments. (App. 33-38).

REASONS THE PETITION SHOULD BE DENIED

I. THE STATEMENT OF THE ISSUES PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI REVEALS A PROFOUND MISUNDERSTANDING OF THIS COURT'S DECISIONS

The statement of the issues presented by Littleton in the Petition reveals a profound misunderstanding of this Court's previous decisions concerning the licensing of activities protected by the First and Fourteenth Amendments.

The first issue is stated as follows:

> For the purposes of reviewing content-neutral sexually oriented business licensing decisions, is prompt judicial access sufficient or must a city somehow provide a prompt judicial decision?

Thus, the basic premise of the principal issue presented by the City is an oxymoron because, by its own terms, the Littleton ordinance, imposing an additional licensing requirement on businesses providing sexually explicit publications and films, necessarily regulates a business on the basis of the content of the speech it presents. This Court in the unanimous opinion in *Thomas v. Chicago Park District*, 534 U.S. 316, n.2 (2002), recently distinguished the ordinance struck down in *FW/PBS* from a content neutral permit scheme since "it involved a licensing scheme that targets businesses purveying sexually explicit speech." *Id.* See also *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (Kennedy, J., concurring in the judgment) [the term "content neutral" is "imprecise"].

Despite these recent statements of the Court, the City repeatedly insists throughout the Petition that its licensing ordinance should be evaluated as a content neutral time, place and manner restriction addressing the adverse secondary effects of one type of speech. This is the central premise of its argument. In the Petition, p. 16, the City states "the Tenth Circuit, by requiring a prompt judicial decision, has conflated the standards traditionally used to analyze a content-based censorship scheme onto a content-neutral licensing scheme, and it has also shifted the burden of obtaining judicial review to the government, thereby reinstituting *Freedman* [*v. Maryland*]'s third prong and applying it within the context of a content-neutral licensing scheme." The City goes on to assert that "the Tenth Circuit decision assumes that Littleton officials charged with licensing decisions should not be trusted." Petition, p. 19.

These arguments are directly contrary to consistent decisions of this Court regarding prior restraints. The United States Supreme Court has always applied the strictest level of scrutiny to any law requiring a license to engage in speech activity. In *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938), the Court recognized that "[t]he struggle for the freedom of the press was primarily directed against the power from the licensor."

> While "[p]rior restraints are not unconstitutional per se . . . [a]ny system of prior restraint . . . comes to this Court bearing a heavy presumption against its constitutional validity." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, at 225 (O'Connor J. plurality) *quoting Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (also quoted in *Vance v. Universal Amusements*, 445 U.S. 308,

> 317 (1980); *See also, Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1962); and *New York Times v. United States*, 403 U.S. 713, 714 (1971).
>
> The presumption against prior restraints is heavier – and the degree of protection broader – than that against limits on expression imposed by criminal penalties. Underlying the distinction is a principle strongly rooted in our law:
>
> [A] *free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.* It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable. *See Speiser v. Randall*, 357 U.S. 513, 2 L.Ed.2d 1460, 78 S.Ct. 1332 (1958).

Southeastern Promotions, Ltd., 420 U.S. at 558-559 (emphasis in original). *See also, Alexander v. United States*, 509 U.S. 544, 125 L.Ed. 2d 441, at 460-461, 113 S.Ct. 2766 (1993) (Kennedy, J. dissenting).

The City's arguments completely ignore these principles, as well this Court's decision in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). In *FW/PBS*, the Court struck down a licensing ordinance that regulated adult businesses:

> Our cases addressing prior restraints have identified two evils that will not be tolerated in such schemes. First, a scheme that places "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *Lakewood v. Plain Dealer*

Publishing Co., 486 U.S. 750, 757, 100 L.Ed.2d 771, 108 S.Ct. 2138 (1988) [citations omitted].

* * *

Second, a prior restraint that fails to place limits on the time within which a decisonmaker must issue the license is impermissible. *Freedman* [*v. Maryland*, 380 U.S. 51], at 59, 13 L.Ed.2d 649, 85 S.Ct. 734 [(1965)]. . . . The failure to confine the time within which the licensor must make a decision "contains the same vice as a statute delegating excessive administrative discretion," *Freedman*, supra, at 56-57. Where a licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion. A scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech. *FW/PBS v. City of Dallas*, 493 U.S., at 225-227.

The Littleton ordinance contains both of the evils identified in *FW/PBS*. While the criteria for granting a license have been held to provide objective standards, the requirement for a license itself involves the exercise of broad discretion by Littleton City officials. Section 3-14-2 of the Littleton Municipal Code defines "adult business" to include, *inter alia*, an adult bookstore, adult novelty store, or adult video store, which devotes a "substantial or significant" portion of its stock in trade, floor space, or advertising costs to sexually explicit items or receives a significant or substantial portion of its revenues from such

items. (App. 83).[1] The terms "significant or substantial," are not defined in the ordinance.[2] Thus, the City retains broad discretion to determine whether or not a business even needs to obtain a license to present protected expression. In this case, the City has consistently refused to provide any guidance as to the meaning of these terms. Respondent has always contended it does not seek to be an "adult bookstore, adult novelty store or adult video store" and, in fact, is not such a business subject to the licensing requirement. The Littleton ordinance vests impermissibly broad discretion in licensing officials to determine who and

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[1] Littleton Municipal Code, Section 3-14-2 defines an "adult bookstore, adult novelty store, or adult video store" as:

> A commercial establishment which 1) devotes a significant or substantial portion of its stock-in-trade or interior floor space to; 2) receives a significant or substantial portion of its revenues from; or 3) devotes a significant or substantial portion of its advertising expenditures to the promotion of: the sale, rental or viewing (for any form of consideration) of books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides or other visual representations which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

The terms, "significant or substantial," and "characterized" are not defined in the ordinance.

[2] The Littleton ordinance definition is broader than the definition in the ordinance struck down in *FW/PBS* which defined "Adult Bookstore or Adult Video Store" to be "a commercial establishment which as one of its principal business purposes offers for sale or rental" sexually explicit materials. *FW/PBS*, 493 U.S. 253-254, n.5 (Scalia, J. dissenting). As noted by Justice Scalia, "the phrase 'as one of its principal business purposes' can connote that the material containing the specified depictions and descriptions does not merely account for a substantial proportion of sales volume but is also intentionally marketed *as material of that character*." *Id.*, at 260 (emphasis in original).

who may not need to obtain a license to present one category of protected speech.

"'The settled rule is that a system of prior restraint avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.'" *Southeastern Promotions, Ltd.*, 420 U.S. at 558, *quoting, Freedman v. Maryland*, 380 U.S. 51, 57 (1965). With regard to the requirement of prompt judicial review, *Freedman* observed that a licensing scheme which lacks the articulated procedural safeguards establishes "a statutory context in which judicial review may be too little and too late" and that "if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final." *Freedman*, 380 U.S. at 57-58.

In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, the Court invalidated an ordinance regulating, *inter alia*, the same activities as those regulated in the challenged Littleton ordinance. The Court expressly held that two of the *Freedman* procedural safeguards were mandated where a licensing requirement was placed on sexually oriented businesses:

> The core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech. Thus, the first two safeguards are essential: the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained and there must be the possibility of prompt judicial review in the event that the license is

erroneously denied. *See Freedman supra*, at 51, 13 L.Ed.2d 649, 85 S. Ct. 734. *See also Shuttlesworth* [*v. City of Birmingham*], 394 U.S. [147], at 155, n.4, 22 L.Ed.2d 162, 89 S.Ct. 935 [(1969)] (content-neutral time, place, and manner regulation must provide for "expeditious judicial review"); *National Socialist Party of America v. Skokie*, 432 U.S. 43, 53 L.Ed.2d 96, 97 S. Ct. 2205 (1977).

* * *

As discussed *supra*, the Dallas scheme does not provide for an effective limitation on the time within which the licensor's decision must be made. It also fails to provide an avenue for prompt judicial review so as to minimize suppression of the speech in the event of a license denial.

Id., at 228-229. (O'CONNOR, J. plurality).

The Court specifically stated in *National Socialist Party v. Village of Skokie*, 432 U.S. 43, 44 (1977), that, in the absence of immediate judicial review "the state must instead allow a stay." *See, 11126 Baltimore Boulevard, Inc. v. Prince George's County*, 58 F.3d 988, 1001 (4th Cir. 1995) (*en banc*) ["the County could avoid the constitutional problem engendered by its present scheme by permitting adult bookstores to operate until judicial determination is rendered . . . "]. *See also, Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 894. (6th Cir. 2000).[3]

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[3] The City mischaracterizes the recent decision in *Deja Vu of Cincinnati, L.L.C. v. Union Township Board of Trustees*, 326 F.3d 791 (6th Cir. 2003), rejecting a provisional license requirement as being

(Continued on following page)

Under the Littleton ordinance, as determined by the Tenth Circuit, there is no assurance of prompt judicial determination. There exists no guarantee that any adult business will operate while any judicial licensing proceedings are pending even before the trial court, nor is there any guarantee that any judicial review that might be available (either in the trial court or on direct appeal) will be required in the shortest fixed period compatible with sound judicial resolution." *Freedman*, 380 U.S. at 39.

The City of Littleton's licensing scheme lacks the crucial procedural safeguards required by *Freedman* to ensure that judicial review does not come "too little and too late." This Court stressed the need for "prompt" and "expeditious" judicial review by repeating these terms no less than five times in Section II.B. of Justice O'Connor's plurality opinion in *FW/PBS, Inc. v. City of Dallas* when referring to the requirement of judicial review. As noted in *Baltimore Boulevard*, 58 F.3d at 1000, "Justice O'Connor's decision in *FW/PBS* cannot be properly read to relax the *Freedman* prompt judicial review requirement. . . . " Under the procedures contained in the challenged ordinance, such review could take years. In the absence of prompt judicial review, the failure of the Littleton ordinance to provide *a mandatory stay* pending review results in a system of prior restraint that fails to properly protect freedom of expression. Therefore, as in *FW/PBS*, the

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insufficient to save a licensing requirement from a challenge for failure to provide prompt judicial review. The Sixth Circuit specifically determined that the Ohio judicial review statutes rendered the provisional license provisions "a nullity" by exempting many proceedings from judicial review. *Id.*, at 801.

ordinance is unconstitutional. The Tenth Circuit correctly struck down the ordinance in this case, and the Petition for Writ of Certiorari should be denied.

II. A PLURALITY OF CIRCUITS HAVE HELD THAT PROMPT JUDICIAL REVIEW REQUIRES A PROMPT JUDICIAL DETERMINATION UNDER *FW/PBS* AND *FREEDMAN*

Petitioner argues that this Court should grant certiorari in this case because the Circuits are "hopelessly deadlocked," Petition, p. 8, on the issue of whether "prompt judicial review" means prompt access to judicial review or a prompt judicial determination. While there is a split in the circuits, this split is not as severe as asserted by the City.

The Fourth, Sixth and Ninth Circuits have previously held "prompt judicial review" requires a prompt decision. *See, Deja Vu of Cincinnati, L.L.C. v. Union Township Board of Trustees*, 326 F.3d 791 (6th Cir. 2003); *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884 (6th Cir. 2000); *Baby Tam & Co. v. City of Las Vegas*, 199 F.3d 1111 (9th Cir. 2000); *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995); *11126 Baltimore Boulevard, Inc. v. Prince George's County*, 58 F.3d 988 (4th Cir. 1995) (*en banc*). The City asserts that the First, Fifth, Seventh, and Eleventh Circuits have held prompt judicial review only requires prompt access to review. *See, Boss Capital, Inc. v. City of Castelberry*, 187 F.3d 1251, 1255 (11th Cir. 1999); *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir. 1994); *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993) (*en banc*); *Jews for Jesus, Inc. v. Massachusetts Bay Transport Authority*, 984 F.2d 1319,

1327 (1st Cir. 1993). See also *Beal v. Stern*, 184 F.3d 117, 129 (2nd Cir. 1999).

However, the recent unanimous decision in *Thomas v. Chicago Park District*, 534 U.S. 316 (2002), partially resolved this split by distinguishing between content neutral licensing requirements and those targeting speech on the basis of its content, as the Littleton licensing requirement struck down in this case. Three of the other circuit decisions cited by Littleton as endorsing access are properly analyzed as content neutral permit regulations that do not require any *Freedman/FW/PBS* safeguards under *Thomas*, unlike the license requirement specifically targeted at businesses that present sexually explicit speech in *FW/PBS*. The First Circuit decision in *Jews for Jesus* and Second Circuit decision in *Beal* dealt with content neutral permit schemes regulating expression in public forums like *Thomas*. Similarly, the Seventh Circuit decision in *Graff* upheld a content neutral regulation of newsstands on public property.[4] Thus, of the five circuits claimed to have held that access to judicial review satisfies *FW/PBS* and *Freedman*, only two, the Fifth and Eleventh Circuits, have specifically dealt with licenses that target businesses that purvey sexually explicit material, the distinction found to be crucial in *Thomas*. See *TK's Video*, 187 F.3d 1251; *Boss Capital*, 24 F.3d 705.

Conversely, all of the cases holding a prompt judicial determination is constitutionally required under *FW/PBS*, involved ordinances that specifically focused on businesses

[4] The district court in *Illusions Too Reality, LLC v. City of Harvey*, 2003 WL 260335 (N.D. Ill. Feb. 4, 2003), apparently did not find the Seventh Circuit decision in *Graff* controlling in adopting the Tenth Circuit's reasoning in this case on the issue of prompt judicial review.

that disseminate adult materials like the licensing ordinance struck down in this case. As noted by the Tenth Circuit opinion, these decisions more faithfully apply the rationale and spirit of *Freedman* and *FW/PBS* in requiring substantive procedural safeguards to obviate the dangers of prior restraint on expression. The foregoing cases, like the Tenth Circuit opinion in this case, properly apply *Freedman* and *FW/PBS* to require that prompt judicial review requires a prompt judicial determination in order to safeguard against the erroneous deprivation of speech rights.

III. THE CITY INCORRECTLY ASSERTS THAT IT IS "UNWORKABLE" TO PROVIDE THE CONSTITUTIONALLY REQUIRED SAFEGUARDS TO PROTECT EXPRESSION

The City argues that it is "unworkable" to guarantee a prompt judicial determination and faults the Tenth Circuit for failing to suggest any methodologies to meet the constitutional requirement for licensing expressive activities. Thus, on the one hand, the City makes a separation of powers argument that the legislative branch should not, and cannot, require the judicial branch to make a prompt decision, and on the other hand, criticizes the judicial branch for not proposing a legislative solution that will protect the right to free speech.

The City apparently is not as creative in protecting speech as it is in restricting speech to limit the alleged adverse secondary effects of unpopular speech. As demonstrated by the citations to the cases above, many jurisdictions have dealt with the issue of prompt judicial review by providing for provisional licenses.

Thus, contrary to the shrill protests of the City, it is *not* impossible to license an adult business under the panel decision. Indeed, the failure is not with the appellate courts for not providing a roadmap to the City to comply with the constitutional requirements imposed by the Supreme Court in this area, but rather with the City for a failure of imagination and will to seriously attempt to fulfill constitutional standards.

The Tenth Circuit upheld many provisions of the Littleton ordinance that address the adverse secondary effects of adult entertainment establishments. The most important of these is the locational restriction which banishes such businesses to limited areas within industrial zoned areas. Even without a licensing requirement, the City of Littleton has numerous tools with which to regulate these businesses. In addition, the City remains free to enforce any criminal laws in the event that actual crimes occur in or around such businesses, and to close such businesses if they constitute a public nuisance.[5]

This Court in *Freedman* and *FW/PBS* imposed important requirements upon municipalities attempting to regulate businesses engaged in certain types of speech through the use of licenses. These requirements should not be brushed aside because it is inconvenient for the

[5] "If, however, a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708, 92 L.Ed.2d 568, 106 S.Ct. 3172 (1986) (O'Connor, J. concurring).

government to ensure that protected speech is not erroneously restrained. The Tenth Circuit decision in this case faithfully applies the decisions of this Court and protects the rights guaranteed to all citizens by the First and Fourteenth Amendments to the United States Constitution. The Petition for Writ of Certiorari should be denied.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, Respondent respectfully requests the Court deny the Petition for Writ of Certiorari.

Dated: June 25, 2003

Respectfully submitted,

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